Re Lim Hong Kee David

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-29-5325-92
KAMALANATHAN RATNAM JC
28 OCTOBER 1995

Bankruptcy *— Petition — Presentation — Whether synonymous with filing — Bankruptcy Act 1967 s 5(1)(d) — Bankruptcy Rules 1969 r 101*

Bankruptcy *— Petition — Notice to oppose — Issues other than cross-claim, set-off or counterclaim — Procedure — Bankruptcy Rules 1969 r 18*

Civil Procedure *— Appeal — New evidence — Reasonable diligence — Burden of adducing party — Rules of the High Court 1980 O 56 r 1(3A)*

Contract *— Guarantee — Construction — Whether guarantor can avail of counterclaim and set-off of debtor*

Civil Procedure *— Jurisdiction — Local jurisdiction — Bankruptcy petition — Debtor resident in Tawau — Courts of Judicature Act 1964 s 23(1)(d) — Bankruptcy Rules 1969 r 101(2)*

The appellant was one of four guarantors of a loan granted by the respondent. When the principal debtor defaulted, the respondent sued the principal debtor and the guarantors, including the appellant. Judgment was entered against, inter alia, the appellant under the O 14 procedure. The appellant's appeal to the Supreme Court was dismissed. Thereafter, the respondent filed a bankruptcy petition against the appellant in August 1992. Upon service of the petition, the appellant filed a notice by debtor of intention to oppose petition. At the hearing of the petition, the appellant took a preliminary objection as to jurisdiction, which was peremptorily dismissed. The main hearing on the petition and the notice to oppose was adjourned. At the resumed hearing, the deputy registrar ruled that the notice to oppose was wrong in law and dismissed the said notice. There being no further objections to the petition, the deputy registrar proceeded to grant the receiving and adjudication orders. The appellant appealed against both the decision to dismiss the preliminary objection and the decision to allow the respondent's petition. In the course of appeal, the appellant filed in September 1995 an affidavit the admissibility of which was opposed by the respondent.

Held, allowing the appeal:

(1) If a judgment debtor wished to raise issues other than having to cross-claim, set-off or counterclaim in opposition to a bankruptcy petition, he had to proceed by way of r 117 of the Bankruptcy Rules 1969 and filed a notice to show cause against the petitioning creditor accompanied by a summons in chambers and an affidavit in support pursuant to r 18 of the Bankruptcy Rules.

(2) Reasonable care or diligence ought to have been exercised in endeavouring to obtain the evidence sought to be adduced earlier. A party seeking to adduce fresh evidence ought to satisfy the court that he had made all reasonable, cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case; and that the failure to adduce such evidence beforehand was not due to indolence or a lackadaisical attitude in the preparation of his case or insufficient preparation at the pre-trial stage.

(3) The reception of the evidence sought to be adduced was not justified. The matters raised in the affidavit could have been obtained with reasonable diligence before trial. Further, such evidence would not have an important influence on the result of the case. The appellant's claim for mismanagement was not quantified.

(4) The afffidavit was not admissible as there was inordinate delay in its filing.

(5) The appellant, being a guarantor, could not avail himself of the defence of counterclaim or set-off. A guarantee was to be construed as a whole against the factual matrix of the background.

(6) Presentation was synonymous with filing in relation to s 5(1)(d) of the Bankruptcy Act 1967 (Act 360) and the Rules made thereunder, namely r 101.

(7) Rule 101(2) of the Bankruptcy Rules 1969 did not apply as there had been no evidence of the place of business of the appellant for the greater part of one year immediately preceding the presentation of the petition.

(8) The court had no jurisdiction to hear the petition pursuant to s 23(1)(b) of the Courts of Judicature Act 1964 as the appellant was resident in Tawau.

(9) On the principle of forum conveniens, the court should decline jurisdiction to hear the petition.

[Bahasa Malaysia summary

Perayu adalah salah seorang daripada empat penjamin kepada pinjaman yang diberikan oleh penentang. Apabila penghutang utama ingkar, penentang menyaman penghutang utama dan penjamin-penjamin termasuk perayu. Penghakiman dimasukkan terhadap, antara lain, perayu di bawah prosedur A 14. Rayuan perayu ke Mahkamah Agung telah ditolak. Selepas itu, penentang memfailkan petisyen kebankrapan terhadap perayu dalam bulan Ogos 1992. Selepas penyampaian petisyen, perayu memfailkan notis niat untuk membantah petisyen. Semasa perbicaraan petisyen, perayu membuat bantahan permulaan mengenai bidang kuasa, yang dengan muktamadnya ditolak. Perbicaraan utama petisyen dan notis bantahan ditangguhkan. Pada perbicaraan yang bersambung, timbalan pendaftar memutuskan bahawa notis

bantahan itu adalah salah di sisi undang-undang dan menolak notis tersebut. Kerana tidak terdapat bantahan lanjut terhadap petisyen itu, timbalan pendaftar meneruskan untuk memberikan perintah penerimaan dan penghukuman. Perayu merayu terhadap kedua-dua keputusan untuk menolak bantahan permulaan dan keputusan untuk membenarkan petisyen penentang. Semasa rayuan, perayu memfailkan dalam bulan September 1995 suatu afidavit yang mana kebolehterimaannya dibantah oleh penentang.

Diputuskan, membenarkan rayuan:

(1) Jika penghutang kehakiman berhasrat untuk membangkitkan isu selain daripada membuat tuntutan balas atau tolakan dalam bantahan kepada petisyen kebankrapan, beliau perlu meneruskan dengan cara k 117 Kaedah-Kaedah Kebankrapan 1969 dan memfailkan notis untuk menunjukkan kausa terhadap pemiutang yang mengemukakan petisyen dengan cara saman dalam kamar dan afidavit sokongan mengikut k 18 Kaedah-Kaedah Kebankrapan.

(2) Ketelitian yang munasabah atau ketekunan sepatutnya dilaksanakan dalam usaha untuk mendapatkan keterangan yang hendak dikemukakan sebelum ini. Pihak yang hendak mengemukakan bukti yang baru mesti meyakinkan mahkamah bahawa beliau telah membuat semua usaha yang munasabah, meyakinkan dan positif dalam ikhtiar untuk mendapatkan keterangan yang paling baik untuk membuktikan kesnya; dan bahawa kegagalan untuk mengemukakan keterangan seperti itu terlebih dahulu bukan akibat daripada kemalasan atau sikap acuh tak acuh dalam penyediaan kesnya atau ketidakcukupan penyedian pada peringkat pra-perbicaraan.

(3) Penerimaan keterangan yang hendak dikemukakan tidak diberi justifikasi. Perkara-perkara yang dibangkitkan dalam afidavit boleh didapati dengan ketekunan yang munasabah sebelum perbicaraan. Selanjutnya, keterangan itu tidak ada pengaruh yang penting ke atas keputusan kes itu. Tuntutan perayu terhadap salah pengurusan tidak dinyatakan kuantitinya.

(4) Afidavit itu tidak boleh diterima kerana terdapat kelewatan yang melampau dalam pemfailannya.

(5) Perayu, sebagai penjamin, tidak boleh menggunakan pembelaan tuntutan balas atau tolakan. Sesuatu gerenti perlu ditafsirkan secara keseluruhannya terhadap fakta matrik latar belakang.

(6) Penyerahan adalah sama erti dengan pemfailan berhubung dengan s 5(1)(d) Akta Kebankrapan 1967 (Akta 360) dan Kaedah-Kaedah yang dibuat di bawahnya, iaitu k 101.

(7) Kaedah 101(2) Kaedah-Kaedah Kebankrapan 1969 tidak terpakai kerana tidak ada bukti tempat perniagaan perayu untuk bahagian yang lebih besar dalam satu tahun betul-betul sebelum penyerahan petisyen.

(8) Mahkamah tidak mempunyai bidang kuasa untuk membicarakan petisyen mengikut s 23(1)(b) Akta Mahkamah Kehakiman 1964 oleh kerana perayu adalah pemaustatin di Tawau.

(9) Atas prinsip forum conveniens, mahkamah sepatutnya menolak bidang kuasa untuk membicarakan petisyen itu.]

Notes

For cases on bankruptcy petition, see 1 *Mallal's Digest* (4th Ed, 1994 Reisuue) paras 1486–1531; [1994] *Mallal's Digest* 139–142; [1995] *Mallal's Digest* 65–68.

For cases on appeal in civil procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reisuue) paras 259–699; [1994] *Mallal's Digest* 210–235; [1995] *Mallal's Digest* 105–134.

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 1994 Reisuue) paras 2092–2255; [1994] *Mallal's Digest* 374–393; [1995] *Mallal's Digest* 237–252.

For cases on guarantee, see 3 *Mallal's Digest* (4th Ed, 1994 Reisuue) paras 1628–1731; [1994] *Mallal's Digest* 757–767; [1995] *Mallal's Digest* 552–561.

Cases referred to

Alston v Alston [1946] P 203 (folld)

Chai Yen v Bank of America National Trust & Savings Association [1980] 2 MLJ 142 (refd)

Commercial Union Assurance Co Ltd, Re (1899) 18 NZLR 585 (folld)

Dayasar Corp Sdn Bhd v C P Ng & Co Sdn Bhd [1990] 1 MLJ 191 (folld)

Fresh Food & Refrigerating Co Ltd v Syme & Co (Behr Mathew Ltd, Third Party) [1935] MLJ 196 (refd)

Hong Kong & Shanghai Banking Corp v Yip Kim Khoon [1991] 3 MLJ 172 (refd)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (folld)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

Loh Kok Hua, Re, ex p Ban Hin Lee Bank Bhd [1992] 1 MLJ 687 (refd)

Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423 (refd)

Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Anor [1989] 2 MLJ 476 (folld)

Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd [1960] 1 All ER 193 (refd)

Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (refd)

Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (folld)

Standard Chartered Bank v Kentland Sdn Bhd & Anor [1990] 2 MLJ 319 (distd)

Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (folld)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (folld)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555 (refd)

Legislation referred to

Bankruptcy (Amendment) Act 1992 (Act A827)
Bankruptcy (Amendment) Rules 1993
Bankruptcy Act 1967 ss 3(1)(i), 5, 6, 7
Bankruptcy Rules 1969 rr 18, 95, 101(1), (2), 117, 121
Courts of Judicature Act 1964 s 23(1)
Federal Constitution art 121(1)
Rules of the High Court 1980 O 56 r 1(3A)
Rules of Supreme Court 1980 r 51(1)

YN Ngeow together with *R Shanmugam* (*Nora Hayati Deol & Partners*) for the judgment debtor/appellant.

WM Chang (*Raja, Darryl & Loh*) for the judgment creditor/respondent.

Kamalanathan Ratnam JC: This is an appeal by the judgment debtor against the decision of the deputy registrar who dismissed the judgment debtor's notice to oppose the petition on 4 April 1995 and in allowing the creditor's petition and thereby making the Receiving and adjudication orders against the judgment debtor. On the same day the judgment debtor raised a preliminary objection to the petition and which said preliminary objection was also dismissed by the deputy registrar. The judgment debtor has appealed against that dismissal too.

Background to the filing of the creditor's petition

The judgment debtor is a guarantor of a loan granted by the judgment creditor to the principal debtor, Golden Produce Sdn Bhd, and the judgment debtor together with four others were the joint guarantors of the said loan. When there was a default in payment of the said loan by the principal debtor the judgment creditor sued the principal debtor and all the guarantors vide Kuala Lumpur High Court Civil Suit 22–C 3796–85. judgment was obtained against the defendants by way of an O 14 application and this judgment debtor's appeal to the then Supreme court was dismissed with costs.

The judgment creditor then proceeded to file this bankruptcy petition against this judgment debtor. The receiver has taken over the affairs of the principal debtor.

Background to the filing of the appeals

When the creditor's petition was served on the judgment debtor, the latter through his solicitors filed a notice by debtor of intention to

A oppose petition which format is provided for as Form 16 in the Bankruptcy Rules 1969 pursuant to r 117.

The said creditor's petition was fixed for hearing on 4 April 1995 before the learned deputy registrar. On the said date counsel for the judgment debtor took a preliminary objection in that he contended that
B this court had no jurisdiction to hear the said petition since the judgment debtor was residing and having his place of business in Tawau/Sabah. The learned deputy registrar peremptorily dismissed the said preliminary objection. He then adjourned the hearing of the creditor's petition to 5 June 1995 and also fixed the hearing of the notice by debtor of intention to oppose the petition.

C On 5 June 1995 when parties appeared before him the learned deputy registrar on his own raised a procedural point questioning the right of the judgment debtor to proceed with his notice of intention to oppose the petition. The learned deputy registrar cited *Dato' Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298. Relying on the
D said case he ruled that the notice was wrong in law and dismissed the said notice. Since there was therefore no further objections the deputy registrar granted the receiving and adjudication orders.

After the RO and AO were granted on 5 June 1995 the appellant herein filed an affidavit dated 19 september 1995 (encl 20). I shall,
E later in the judgment, refer to the said affidavit.

Before me on the hearing of these appeals counsel for the respondent opposed the admissibility of encl 20. By consent it was agreed by counsel that I hear submissions on the admissibility of encl 20 before hearing arguments on the appeals proper.

F *Is encl 20 admissible?*

Mr WM Chang for the respondent/judgment creditor relied on O 56 r 1(3A) of the Rules of the High Court 1980.

The said sub-r 3A reads as follows:

G (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that—

(a) At the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

H (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

It was his contention that since he relied on O 56 r 1(3A) it was proper for the court to know what the issues were before the learned deputy registrar.

I All that the deputy registrar had before him was encl 12 which was a notice by debtor to oppose the petition and which notice was based on r 117 of the Bankruptcy Rules 1969. Enclosure 12 raised a two-fold attack:

(a) that the petitioning creditor had failed to provide the detailed accounts to show the actual amount repaid; A

(b) that the debtor was never residing or having his place of business in Kuala Lumpur. In other words he was taking a jurisdictional point.

It was argued on behalf of the respondent that the appellant/judgment debtor could not raise these two issues without an affidavit in support. B The two issues being issues of fact, it was necessary for an affidavit in support to be filed otherwise it was contended that these were mere allegations. In support counsel relied on r 121 of the Bankruptcy Rules 1969 which states:

> On the appearance of the debtor to show cause against the petition the petitioning creditor's debt and the act of bankruptcy or such of those matters as the debtor shall have given notice that he intends to dispute shall be proved and if any new evidence of those matters or any of them be given or any witness or witnesses to such matters be not present for cross-examination and further time be desired to show cause the Court shall if the application appears to the Court to be reasonable grant such further time as the Court thinks fit. C D

It was argued that the debtor had to prove such matters as are in dispute or which he had raised in r 117.

Rule 117 reads: E

> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

The respondents argued that they had substantiated their creditor's F petition with an affidavit of truth of statement of petition (encl 6) and since they have affirmed under oath as opposed to a mere statement by the debtor, the latter had not 'proved' his facts as raised in his encl 12. There was no affidavit filed by the judgment debtor refuting encl 6. In fact the appellant filed no affidavit at all. G

The respondents raised a further issue, ie whether the judgment debtor was procedurally correct by raising an objection solely through encl 12. They argued that the proper procedure was to file the notice under r 117 and then to proceed to file a summons in chambers pursuant to r 18 of the Bankruptcy Rules 1969: H

> 18 (1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
>
> (2) Notwithstanding sub-rule (1), where applicable, all applications filed by way of motion before the commencement of these rules may be heard by the registrar as if they were applications made under such rules. I

The appellants argued that r 117 provides for a distinctive procedure in that it is the only avenue for a judgment debtor to dispute the truth of

A the statements contained in the petition. The appellant relied on *Hongkong & Shanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172 and contended that no affidavit need be filed.

In the *Hongkong* case the petitioner filed a notice of bankruptcy and a creditor's petition. The judgment debtor filed a notice of intention B to oppose the petition pursuant to r 117. The creditor replied to the said notice by way of an affidavit. In reply to the said affidavit of the petitioning creditor, the debtor filed an affidavit in reply.

Hence it is clear that affidavits were filed although the said affidavits emanated from a statement. But every statement in a petition is supported by an affidavit of truth of statement in petition. C

Referring to r 18 the appellant argues that this rule is only applicable for any matters not provided in any of the Bankruptcy Rules including r 117.

The appellants in refusing to be bound by the learned deputy registrar's citation of *Datuk Lim Kheng Kim* argued that in the said case D the judgment debtor filed two affidavits, ie (a) once after the bankruptcy notice was served, and (b) after the petition was served. The appellant's counsel contended that no notice was filed under r 117. Whilst agreeing with the decision of the case, Mr Ngeow argued that r 18 is only applicable to any issue raised outside the scope of r 117 and he submitted E that his encl 12 had confined itself to the scope of r 117.

Mr Ngeow relied on *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 and to the concluding passage of Edgar Joseph Jr J (as his Lordship then was):

> On a concluding note, bearing in mind that bankruptcy proceedings, if F successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex p Hasluck* is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Whilst I am in total agreement with the exposition of the law propounded G by this eminent judge I fail to see the relevance of the above citation to the present case.

In response to the respondents raising O 56 r 1(3A) of the Rules of the High Court 1980 the appellant argued that this court ought to also consider other rules, namely the Rules of Supreme Court 1980 r 51(1) which reads: H

> 51 (1) The court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or Commissioner.

I With respect this is a fallacious argument. Whilst there is in existence a relevant and pertinent O 56 r 1(3A)(a)(b) of the Rules of the High Court 1980 there is no need to resort to any other rules that obliquely refer to the issue at hand.

The appellant cited various authorities to support his contention that encl 20 ought to be admitted.

In *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 the Supreme Court held that whilst it had a general discretion to admit fresh evidence under s 69(1) of the Courts of Judicature Act 1964 the appellate court was satisfied as to the reason why the evidence was deliberately not adduced in the court below and the court therefore made an order giving leave for the evidence to be produced.

In *Fresh Food & Refrigerating Co Ltd v Syme & Co (Behr Mathew Ltd, Third Party)* [1935] MLJ 196 the application to adduce fresh evidence was rejected on the basis that it could have been available at the original hearing.

In *Chai Yen v Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 the then Federal Court rejected the admission of fresh evidence on the basis that it was not shown that the said evidence could not have been obtained with reasonable deligence for use at the trial.

What then is reasonable diligence?

Counsel for the appellant concedes that his research has not led him to any decided authority that defines reasonable diligence. Neither has counsel for the respondent adduced any authority although he had specifically relied on this, having referred to O 56 r 1(3A).

Diligence means industry. It is a steady, earnest and meticulous pursuit towards the attainment of one's goal. In the context of obtaining the fresh evidence that is intended to be adduced, the party seeking to make such an introduction ought to satisfy the court that he has made all reasonable cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case. It is his duty to show to the court that neither indolence nor a lackadaisical attitude predominated in the preparation of his case nor that insufficient preparation at the pre-trial stage led to the party being unable to adduce the evidence he now seeks to introduce as fresh evidence. If all reasonable efforts had been exhausted and fresh evidence that is sought to be introduced could not have been thus obtained the court ought then to allow for the admission of such fresh evidence subject of course to any existing statutory provisions. Positive, tangible or clear explanation ought to be given as to why such evidence could not have been obtained with reasonable diligence for use at the trial.

In *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1960] 1 All ER 193, 219 CA Willmer LJ said:

> An obligation to exercise due deligence is to my mind indistinguishable from an obligation to exercise reasonable care.

I would therefore hold that reasonable case or diligence ought to have been exercised in endeavouring to obtain this evidence earlier. Counsel for the appellants relied on *Standard Chartered Bank v Kentland Sdn*

A *Bhd & Anor* [1990] 2 MLJ 319 and argued that an appeal from the registrar to a judge in chambers operates by way of rehearing and it was common practice for the judge subject to the question of costs, to admit further or additional evidence.

However, this argument fails to address the fact that subject to
B Practice Direction No 3 of 1993 which came into effect from 1 April 1993 and which Practice Direction was made pursuant to the Bankruptcy (Amendment) Act 1992 (Act A827), the deputy registrar now has been vested with the powers to hear all creditors' petition filed pursuant to ss 5, 6 and 7.

C I find that the guideline provided by the Act and the Rules regarding objections to be taken lead to the following conclusions:

(a) If the judgment debtor says he should not be made a bankrupt because he has a cross-claim, set-off or counter claim against a creditor, then he must take this objection by way of an affidavit to
D be filed within seven days of the service of the bankruptcy notice (see s 3(1)(i) of the Act and r 95).

Section 3(1)(i) reads:

> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on
E him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case
F the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in
G which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

H Rule 95 reads:

> (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors,
I if known.
>
> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

(b) If a party is out of time or wishes to raise issues other than having to cross-claim, set off or counter claim then he was to proceed by way of r 117 and file a notice to show cause against the petitioning creditor accompanied by a summons in chambers and an affidavit in support — r 18. See *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 at p 305, SC.

I find that in this case the appellant has filed a notice in accordance with r 117 (encl 12) but he had omitted to file a summons in chambers and an affidavit in support.

Could the evidence to be adduced through encl 20 have been available to the appellants before the hearing of the matter before the deputy registrar?

The respondents hold that with reasonable diligence such evidence would have been available. To ascertain this it was necessary to look into the contents of encl 20.

In *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70, 71 Suffian FJ laid down the principles to be satisfied before an appellant can adduce further evidence at the hearing of an appeal. He said:

> To justify the reception of this evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.'

By consent parties agreed that the issues raised in encl 20 were:

(a) That the security given by the principal debtor was sold at an undervalue.

(b) That there was mismanagement by the receivers and managers appointed by the creditors.

(c) That the petitioning creditor approached a valuer some time in February 1995 asking him if he could support a valuation of RM1.8 million and that the valuer refused to do so.

With regard to (a) I find that the sale took place in August 1994 and that the hearing before the deputy registrar was in June 1995. This information could have been easily obtained by making a search at the Land Office or even by way of an enquiry from the petitioner's solicitors. With regard to (b), since the appointment was effective as of 22 December 1988 and this was long before the hearing before the deputy registrar this information could have been readily available earlier. In respect of (c), if this was true, clearly it was readily available earlier.

Therefore the appellants have failed to meet the full requirement as enunciated in *Lau Foo Sun*.

A With regard to the second principle as held in *Lau Foo Sun* the appellants contend that the sale was made at an undervalue and enclosed a valuation report as at 1985 which valued the land at RM4.41 million. However, the total debt owing to the petitioning creditor was in excess of RM23 million and in the circumstances the admission of this fact now would have no important influence on the result of the case. B Further relying on *Re Loh Kok Hua, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687 this court can still make a receiving order unless the debt was less than the statutory minimum of RM2,000 and as was said by Mohamed Dzaiddin J (as his Lordship then was):

> C ... Since on the true construction of s 6(2) read with s 5(1)(a) of the Act it is necessary to prove that a debt exceeding the statutory minimum of RM2,000 is still due and owing to the bank at the date of the hearing of the petition.

The sum of RM2,000 has now been amended to RM10,000 (Act A 827/92) wef 17 July 1992).

D I further hold that even assuming the appellant has a counter-claim on the basis of mismanagement, the appellant ought to have quantified the sum due to him.

In *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423 Mohamed Azmi SCJ held at p 430:

E

> The burden of proof is on the respondent to show by the affidavit that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it.

Inordinate delay

F I further reject the admissibility of encl 20 on the grounds that the said affidavit was filed way out of time. It was filed on 19 September 1995 whereas the bankruptcy notice was filed on 13 August 1992 and served on the debtor on 7 October 1992 (encl 4 affidavit of service). Therefore encl 20 ought to have been filed on or before 14 October 1992. The appellant is three years out of time.

G

Court to accede to business efficacy

Even assuming I admit encl 20 it is my considered view that the contents of the said enclosure would make no difference to the outcome of the appeal. The judgment debtor being a guarantor cannot avail himself of the defence H of counter claim or set-off. Notwithstanding the passage in 20 *Halsbury's Laws of England* (4th Ed) para 190 which states:

> On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right of set-off or counterclaim which the principal debtor possesses against the creditor, and any division of the High Court can give effect to it or to any equitable defence raised.

I

I hold the view expressed by Gunn Chit Tuan J (as he then was) in *Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Anor* [1989] 2 MLJ 476, 478 when he said that the courts in the country hearing commercial cases ought to:

> ... recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so.

His Lordship in considering this same passage from *Halsbury*, rejected its applicability and held that the right way of construing the guarantee was to construe it as a whole against the factual matrix of the background and he excluded all set-offs and counterclaims.

Jurisdiction

With regard to the issue of jurisdiction, the appellant relies on r 101(1) and (2) of the Bankruptcy Rules 1969. It was submitted before me that since the decision in *Hongkong & Shanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172 which held that r 101(1) and (2) were mandatory in nature and which said decision of Shaik Daud J (as his Lordship then was) was upheld by the then Supreme Court, the said sub-r (2) has been amended from 'shall' to 'may' pursuant to PU(A)60/1993. I caused a search to be made with the Federal Court Registry and it has been confirmed that the appeal to the Supreme Court was not heard but withdrawn and the appeal struck out.

It was argued by the respondent that it is now clear that it is no longer mandatory for the petition to be filed in the court of the state in which the debtor had carried on business.

The appellant, however, contended that the appeal on this ground ought to be allowed.

The venue where the petition ought to be presented is governed by s 5(1)(d) of the Bankruptcy Act 1967 (Act 360) and the Rules made thereunder, namely r 101.

Section 5(1)(d) reads:

> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—
>
> ... (d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

Rule 101 reads:

> (1) The petition may be filed in the court in which it is to be presented.
>
> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition shall be filed in the Court of the State in which he has carried on business.

Whilst it is clear that s 5(1)(d) talks of where the petition is to be presented, r 101 relates to the filing of the petition.

Pursuant to the amendment PU(A)60/1993 the word 'shall' has been substituted with 'may' in r 101(2) of the rules. But r 101(2) applies in cases where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one state and resided in another state and in such cases the petition may be filed in the court of the state in which he has carried on business.

In this case there is no evidence as to whether the debtor carried on business in KL or in Tawau. All that the petition states is the debtor's place of residence which is in Tawau.

In *Alston v Alston* [1946] P 203 Willmer J had this to say on the presentation of a divorce petition at pp 204, 205:

> According to s 2 of the Matrimonial Causes Act 1937 [repealed; see now s 1(1)(a) of the Matrimonial Causes Act 1965], the petitioner, if he is to succeed, must establish a period of desertion of at least three years immediately preceding the presentation of the petition. It therefore becomes obvious that it is vital to decide at what stage a petition is presented ... There appears strangely enough to be no authority which counsel has been able to find as to what presentation of the petition means ... It has been argued with some considerable force that a petition can only be said to be presented when it actually reaches the court. That must be, and can only be, on the day when the petition is filed. The point is purely a technical one ... I think both on the merits of the case and also on the technical ground, I must decide that a petition is presented when it is filed with the court.

With regard to filing, Stout CJ of New Zealand said in *Re Commercial Union Assurance Co Ltd* (1899) 18 NZLR 585, 588:

> What is the meaning of the word 'filed'? Filing, it has been said, is the means adopted of keeping court documents ... In its primitive meaning 'filing' means putting the documents on a file; but now documents are kept together by other methods. 'Filing' now really means depositing in a court office. It has, in my opinion, acquired this secondary meaning; and in *Wharton's Law Lexicon* it is said that 'to file' means to deposit at an office.

In the circumstances and in the light of the decision in *Alston v Alston* I hold that presentation is synonymous with filing. I am further fortified in holding this view when I read r 101(1) which states in clear express terms that the petition shall be filed in the court in which it is to be presented.

Since I hold the view that r 101(2) does not apply to this case as there has been absolutely no evidence of the place of business of the debtor let alone evidence of his place of business for the greater part of one year immediately preceding the presentation of the petition it is the duty of the petitioner to file the petition in compliance with the Courts of Judicature Act 1964.

In *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 Lim Beng Choon J considered this very same issue and referred to s 23(1) of the Courts of Judicature Act 1964 which reads:

23 (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where— A

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business; B

(c) the facts on which proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in the section in any case where all parties consent in writing within the local jurisdiction of any C other High Court.

Lim Boon Choon J held at p 270:

> In considering the jurisdiction issue, it is important at the outset to take note of the provisions of art 121(1) of the Constitution which reads: D
>
> '121 (1) Subject to clause (2) the judicial power of the Federation shall be vested in *two High Courts* of co-ordinate jurisdiction and status, namely—
>
> (a) one in the States of Malaya which shall be known as the High Court in Malaya which shall have its principal registry in Kuala Lumpur, and E
>
> (b) one in the Borneo States which shall be known as the High Court in Borneo and shall have its principal registry at such place in the Borneo States as the Yang di-Pertuan Agong may determine.' (my emphasis).
>
> From the wordings of art 121(1) it cannot be disputed that the F Constitution created only two High Courts, that is the High Court in Malaya and the High Court in Borneo. The definition of the term 'High Court' in s 3 of the Courts of Judicature Act 1964 ('the 1964 Act') does no more than to reiterate the constitutional policy entrenched in art 121(1) of the creation of only two High Courts. It is implicit that a High Court located at Penang or at Alor Setar is but a branch of the High G Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

Having held that his court had jurisdiction to entertain the civil proceedings filed therein the learned judge went on to consider the question of forum conveniens. He held at p 271: H

> However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind: I
>
> (i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort

was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the inconvenience caused may outweigh the amount of costs awarded to him;

(ii) the obvious reason for the setting up of a branch of the High Court in Malaya in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.

Subsequently Edgar Joseph Jr J (as his Lordship then was) in *Wee Chow Yong t/a Vienna Music Centre v Pulic Finance Bhd* [1989] 3 MLJ 508 followed the decision of Lim Beng Choon J in *Sova Sdn Bhd* and held 'that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state'.

In *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 on a similar issue Abu Mansor J (as his Lordship then was) held that based on the Courts of Judicature Act 1964, s 23(1)(b) and also on the forum conveniens principle the matter ought to have been filed in Kuching.

It was submitted to me that this decision was on appeal to the then Supreme Court. I caused a check with the Registry of the Federal Court and I have been informed that although the appeal has not as yet been fixed for hearing, but that the registry has been informed by the appellant's counsel that he would not be proceeding with the said appeal and would be filing a notice of discontinuance.

Shaik Daud J (as his Lordship then was) held that r 101(1) and (2) were mandatory in *Hongkong & Shanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172. However, it is unfortunate that his Lordship was not given the benefit of research and the earlier cases referred to herein were not cited to his Lordship. His Lordship interpreted strictly the provisions of 'shall be filed' and translated the same as being mandatory. It is to be noted that an amendment to the Rules vide PU(A)60/1993 (which became effective as of 1 April 93) amended the word 'shall' to read 'may' in r 101(2).

In *Dayasar Corp Sdn Bhd* Abu Mansor J (as his Lordship then was) correctly interpreted s 23(1)(b) of the courts of Judicature Act 1964. Since s 3 of the same Act defines the 'High Court' as the High Court in Malaya, and the High Court in Borneo or either of them as the case may require and since he held that the respondent company was residing in Kuching, he was right when he held further that it was certainly not the intention of the legislature for any court in Malaya to assume jurisdiction of the matter arising in or which should be filed in a Borneo

court. Abu Mansor J (as his Lordship then was) agreed and adopted what was stated by Hashim J (as he then was) in *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 that the definition of local jurisdiction sets out and determines the territorial jurisdiction of either of the High Courts. He further held that by this rule since the defendant/respondent company was residing in Kuching, the matter should really be filed in the Borneo High Court, in particular in Kuching.

However, his Lordship went further and also applied, in the alternative, the forum conveniens rule.

I hold that once it is shown that s 23(1)(b) of the Courts of Judicature Act 1964 applies then the issue of forum conveniens need not be considered unless it is raised as an alternative plea.

I agree with the views expressed by Abu Mansor J (as his Lordship then was) and hold that as in this case since the petition shows that the creditor was resident in Tawau, this petition ought to have been filed in Tawau pursuant to s 23(1)(b) of the Courts of Judicature Act 1964 and not on the principle of forum conveniens which was a more equitable consideration. I am fortified in this view because s 23(1) concludes that in respect of (a)–(b) the matter ought to be filed in the local jurisdiction of the court and only with the consent of the parties in writing within the jurisdiction of the other courts. In *Sova Sdn Bhd*, Lim Beng Choon J had to consider a suit filed in Alor Star when the cause of action arose in Penang and the place of business of both the plaintiff company and the defendant company was in Kuala Lumpur. The learned judge rightly held that it was implicit pursuant to art 121(1) of the Federal Constitution that a High Court located in Penang or at Alor Star is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. However, the territorial limits of the two High Courts have been defined by sub-art (a) and (b) of art 121.

It was this same principle that Edgar Joseph Jr J (as his Lord then was) adopted in *Wee Chow Yong*. In the said case the matter was filed in Penang whereas the debtor was at all material times resident in Alor Star.

Even if I am wrong on this I hold that on the principle of forum conveniens this appeal ought to be allowed.

Practice Direction No 3 of 1993 which came into force on 1 April 1993 makes it clear that all petitions ought to be filed in the state in which the petitioner resides and that in the case of a petition filed before the coming into effect of these Practice Directions the petitioner ought to apply in writing to transfer the petition to the court of the state where the debtor resides.

I therefore:

(1) disallow the appellant's application for the admission of encl 20 to be included in this appeal;

(2) allow the appeal of the judgment debtor with regard to his preliminary objection made on 10 April 1995. I hold that this court has no jurisdiction to hear this petition pursuant to s 23(1)(b) of the Courts of Judicature Act 1964 and not necessarily on the basis of forum conveniens which itself is sufficient ground to allow the appeal based on Practice Direction No 3 of 1993;

(3) allow the appeal of the judgment debtor against the decision of the deputy registrar in making the receiving and adjudication orders on 5 June 1995;

(4) make an order striking off the petition with liberty to apply;

(5) award costs to the judgment debtor.

Appeal allowed.

Reported by PY Lo